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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 20290
LAWRENCE PITTS,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION AND JUDGMENT OF BURGLARY, A THIRD DEGREE FELONY, IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE JAY E. BANKS, PRESIDING.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the trial court err in refusing to instruct the jury on the lesser included offense of theft?

II. Did the trial court err in denying defendant's motion to dismiss the burglary charge?

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 20290
LAWRENCE PITTS,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

The defendant, Lawrence Pitts, was charged by information with Burglary, a felony of the Third Degree, in violation of Utah Code Ann. § 76-6-202 (1953), as amended. After a trial by jury on September 25 and 26, 1984 in the Third Judicial District Court, the Honorable Jay E. Banks, presiding, defendant was found guilty of Burglary. On September 26, 1984, defendant was sentenced to the indeterminate term as provided by law of zero to five years in the Utah State Penitentiary.

STATEMENT OF THE FACTS

On August 4, 1984, sometime after noon and before store closing time at 1:00 a.m., some blank checks and an envelope containing a bank statement and endorsed checks were stolen from a Handy Pantry convenience store in Salt Lake City (T. 14, 15). The items were taken from an office in the back room, which is off limits to the public (T. 22). The door to the back room is generally kept open except when Preston Tholen, the store owner, is working in his office (T. 13) and the door was open during the

time in question on August 4 (T. 14) . On each side of the door a sign is posted which states "Employees only. Others will be prosecuted. Management." (T. 13). This sign is clearly visible to anyone walking down the store aisle toward the back room (T. 17, 119).

The bank statement had been delivered that day and an employee had put it on top of the owner's desk (T. 10-11). The blank checks were kept hidden in an envelope in the back of a small carry box under the desk (T. 24, 31). Although four blank checks and the envelope containing the bank statement were recovered, five blank checks and thirty to forty of the endorsed checks from the statement were never recovered by the police (T. 24, 31, 33). The five blank checks were forged against the store owner and later returned by the bank (T. 32).

Two Handy Pantry employees, Valerie Swaner and Creed Anderson, saw defendant in the store around 7:00 p.m. on August 4 (T. 36). Defendant's common-law wife, Ordena Longton, testified that on that evening she, defendant, and another woman drove to Handy Pantry in her yellow Datsun to buy some formula for her baby (T. 51-53). Defendant and the unidentified other woman went into the store while Ms. Longton made a telephone call (T. 53). As the defendant, Ms. Longton and the woman drove away from the store, Ms. Longton noticed that defendant had an envelope similar to the one later identified as being stolen from the Handy Pantry (T. 54-55). When she asked defendant about the envelope, he told her it contained checks and that "they weren't for him, that somebody else could use them" (T. 55-56). Defendant then took Ms. Longton home and left in her car (T. 56-57).

At about 11:00 p.m. that night defendant drove to the home of Sharon Spencer in Ms. Longton's yellow Datsun (T. 72). While defendant and Ms. Spencer had a conversation in the car, Ms. Spencer saw an envelope similar to the stolen one between the driver and passenger seats (T. 13). When she reached for the envelope, defendant moved it away from her, either onto his lap or by his side (T. 74). He later carried the envelope with him into Ms. Spencer's house (T. 75, 81). Both Ms. Spencer and her roommate Merna Norwick testified that defendant watched television at their house for a few hours and then fell asleep on the couch with the envelope in front of him on the coffee table (T. 75-76, 83). In the morning defendant, the envelope and the yellow Datsun were gone (T. 76, 84).

On the morning of August 5, police office David Rowley was looking for defendant as part of an investigation of a theft reported by Sharon Spencer (T. 104-105). He was also looking for the yellow Datsun which was involved in a "breach of trust" reported by Ordena Longton (T. 63, 104-105). He located both defendant and the Datsun at Second North and Fifth West in Salt Lake City, (T. 104-105). The checks and the bank statement were found in the glove compartment of Ms. Longton's Datsun (T. 93). Defendant denied any knowledge of the checks, but Ms. Longton told the police that defendant had come out of the Handy Pantry in possession of the checks and that defendant knew someone who could "pass the checks for thousands" (T. 103, 110). The police contacted Preston Tholen and determined that the bank statement and the checks had been taken from the store and defendant was

then charged with burglary (T. 100-101). At trial, after a little over an hour of deliberation, the jury found defendant guilty of burglary.

SUMMARY OF ARGUMENTS

The trial court did not err in denying defendant's request for a jury instruction regarding theft as a lesser included offense of burglary. The two offenses are not sufficiently related for theft to be considered included in burglary. They protect entirely different interests, proof of theft is not generally presented as part of the showing of the commission of burglary, and they address competely separate acts. Theft merely serves on occasion as circumstantial evidence of an element of burglary. Moreover, there was not a sufficient quantum of evidence to provide a rational basis for acquitting defendant of burglary and convicting him of theft. Defendant presented no evidence to support his theory of the case; he merely asserts on appeal that the sign prohibiting entry into the back room was not noticeable and that therefore his entry was licensed. The trial court did not abuse its discretion in holding that the back room was clearly not open to the public and that defendant was not entitled to a lesser included offense jury instruction.

The trial court did not err in denying defendant's motion to dismiss the charge of burglary for the State's failure to present sufficient evidence to establish a prima facie case. The State presented sufficient circumstantial evidence of defendant's entry into the back room. Defendant's entry was

shown to be unlawful because there was uncontroverted evidence of a sign prohibiting entry and that the store's owner did not allow the public into the back room. Furthermore, since at trial defendant did not attempt to assert that he assumed that he had consent or explain away the evidence that no consent existed in fact, the State had no obligation to prove his state of mind. Defendant's possession of the stolen property along with his lies about that possession served as sufficient evidence of his intent to commit a theft at the time of his unlawful entry.

ARGUMENT

POINT I

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THEFT AS A LESSER INCLUDED OFFENSE OF BURGLARY WAS CORRECT.

At trial, defendant requested that instructions be given on theft as a lesser included offense of burglary. The court refused this request, and defendant objected (T. 166-167). On appeal, defendant claims that the trial court's refusal to give the instructions constitutes reversible error. Defendant relies on the recent Utah Supreme Court case, State v. Baker, Utah, 671 P.2d 152 (1983), to support his claim.

In Baker, this Court addressed the Utah lesser included offense statute, Utah Code Ann. § 76-1-402(3)(a) (1953) as amended, which provides:

> (3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:
> (a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged.

This Court set forth two different standards to be applied when a lesser included offense instruction is requested. When the prosecution requests the instruction, the trial court should use the "necessarily included offense" standard to determine if the instruction should be given. This strict standard requires a comparison of the abstract statutory elements of the offenses, and is necessary to ensure that the defendant has had notice of and opportunity to defend against the lesser offense: "his defense against the greater will of necessity, be a defense against the lesser also, with regard to both the law and the facts alleged." Baker, at 156. When the defendant requests the instruction, however, the court should apply the more flexible evidence-based standard. The Court expressed concern that without the option of convicting of a lesser offense, when an element of the charged offense is in doubt but the defendant is plainly guilty of some offense, the jury may opt to convict rather than to fulfill its duty to acquit. This more lenient standard is therefore necessary to afford the defendant the full benefit of the reasonable doubt standard.

Under the evidence-based analysis, a two-pronged test must be met before a defendant is entitled to a lesser included offense instruction. First, the trial court must determine if the "two offenses are related because some of their statutory elements overlap and . . . [if] the evidence at the trial of the greater offense includes proof of some or all of those overlapping elements . . . " Baker at 159. If so, the lesser offense is included in the greater. Second, the court must

determine if Utah Code Ann. § 76-1-402(4) (1953) as amended is satisfied, i.e., if "there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." In the present case, defendant was not entitled to a lesser included offense instruction regarding theft, because neither prong of the Baker test was met.

A. DEFENDANT WAS NOT ENTITLED TO A JURY INSTRUCTION REGARDING THEFT AS A LESSER INCLUDED OFFENSE OF BURGLARY BECAUSE THE TWO OFFENSES ARE NOT SUFFICIENTLY RELATED TO BE CONSIDERED INCLUDED.

Defendant claims that there is a statutory overlap of the two offenses of burglary and theft and that therefore the first prong of the Baker test is met. The elements of burglary, as charged in this case, are:

1) entering or remaining in a building or any portion of a building

2) doing so unlawfully

3) doing so intentionally or knowingly

4) doing so with the intent to commit a theft

(see jury instruction #19, Appendix)

The elements of theft are:

1) exercising unauthorized control over the property of another

2) doing so with the intent to deprive the owner of the property

(see defendant's requested instruction #4, Appendix).

Although defendant frames the issue somewhat differently, his argument is essentially that since he was charged with a

variation of burglary that proscribes entering or remaining unlawfully in a building with the intent to commit a theft, the statutory elements of theft and burglary overlap. He further claims that this overlap is sufficient to satisfy the second prong of Baker.

This analysis involves only a superficial comparison of the language constituting the statutes describing the two offenses, and is a misapplication of the Baker standard. Although it is true that an insignificant statutory overlap does exist, the central elements of the two offenses are entirely different and do not overlap. The gravamen of burglary is the unlawful entering or remaining in a building, and the element of intent to commit theft merely amounts to the equivalent of an aggravating circumstance raising to burglary the less serious unlawful entry or remaining proscribed by criminal trespass. Theft, a crime involving the taking of another's property, is simply not inherently related to burglary. The two offenses protect different interests and are committed by completely different acts. Traditionally, the State has been able to charge a defendant with both offenses when intent to commit a theft underlies the burglary and a theft is completed during the same criminal episode. (See, e.g. Rogerson v. Harris, 111 Utah 330, 178 P.2d 397 (1947), State v. Jones, 13 Utah 2d 35, 368 P.2d 262 (1962).

In Baker, this Court warned against using the sort of analysis urged here by defendant to find two such unrelated offenses included:

> This requirement that there exist some overlap in the statutory elements of allegedly "included" offenses would prevent the argument that totally unrelated offenses could be deemed included simply because some of the evidence necessary to prove one crime was also necessary to prove the other. For example, evidence proving theft in a trial involving only a charge of first degree homicide would not make theft a lesser included offense under § 76-1-402(3)(a) because none of the statutory elements of theft and homicide overlap.

Baker at 159.

Defendant's mechanistic and superficial comparison of the language of the two statutes without regard to the true nature of the offenses they describe would allow unrelated offenses to be deemed included if the lesser offense were incidentally proved in the course of proving the greater. Since Baker this Court has not further elaborated on how extensive a statutory overlap must be to meet the first prong of Baker. However, other jurisdictions interpreting evidence-based standards similar to that set forth in Baker have developed a method of statutory comparison that is consistent with the policies underlying the lesser included offense doctrine. These courts have identified several factors to be considered in determining when two offenses are sufficiently related for the lesser to be deemed included in the greater.

In United States v. Whitaker, 447 F.2d 314 (D.C. Cir. 1971), cited several times in Baker, the District of Columbia Circuit Court of Appeals was the first court to analyze the difference between the two standards to be used in determining when a lesser included offense instruction is warranted. Whitaker had requested a jury instruction regarding unlawful

entry as a lesser included offense of burglary. The trial court denied the request, holding that unlawful entry was not a lesser included offense of burglary. The court reasoned that the offense of unlawful entry required the element of entry without authority and against the will of the lawful occupant, while certain variations of burglary did not require the entry to be unlawful for conviction. The Court of Appeals reversed, stating that since the evidence showed that the defendant's entry had indeed been unauthorized, "it is unrealistic and artificial, on the statute involved, the indictment, and the proof in this case to deny a lesser included offense instruction on unlawful entry." Whitaker at 320. Thus the strict "necessarily included offense" analysis employed by the trial court had been inappropriate. Since the defendant rather than the prosecution had requested the instruction,a more natural and realistic evidence-based standard should have been used. The trial court should have given the jury instructions if the lesser offense had been established by the evidence presented at trial in proof of the greater offense. However, the court added a caveat that:

> there must also be an "inherent" relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense. This latter stipulation is prudently required to foreclose a tendency which might otherwise develop towards misuse by the defense of such rule. In the absence of such restraint defense counsel might be tempted to press the jury for leniency by requesting lesser included offense instructions on every lesser crime that could

> arguably be made out from any evidence that happened to be introduced at trial. "An element of the mercy-dispensing power is doubtless inherent in the jury system, and may well be a reason why a defendant seeks a lesser included offense instruction, but it is not by itself a permissible basis to justify such an instruction."
>
> Whitaker at 319, citing Kelly v. United States, 125 U.S. App. D.C. at 207, 370 F.2d at 229 (1966).

This warning mirrors the Baker court's concern that this more lenient evidence-based standard might be abused. Moreover, the "inherent relationship" test is designed to protect against the same possible abuses by defense counsel that prompted the Baker court to require that the two offenses be "related". Therefore, the "inherent relationship" test, as it is employed in Whitaker and in later cases applying Whitaker, is helpful in determining the parameters of the "relationship" required by the Baker evidence-based analysis.

The Whitaker court found that there was an inherent relationship between the two offenses of burglary and unlawful entry since "the criminal activity proscribed by the two offenses violates the same interest - that of the property owner in protecting the integrity of his premises" Whitaker at 319.

Various state and federal jurisidctions have adopted the "inherent relationship" test. Several of these courts have applied the test to two allegedly related offenses and determined that one offense was not a lesser included offense of the other. In Ballard v. United States, 430 A.2d 483 (D.C. App. 1981), the defendant had been charged with both rape and carnal knowledge and

appealed, claiming that carnal knowledge was a lesser included offense of rape and that therefore he should not have been charged with both offenses. This was not a case where the defendant had requested a lesser included offense jury instruction. Nevertheless, the District of Columbia Court of Appeals applied the "inherent relationship" test. The court reasoned that since the interest violated by the offense of rape is the injury to the feelings of the victim by the forceful violation of her person, and the interest violated by the offense of carnal knowledge is the sexual innocence of females below the age of sixteen, carnal knowledge is not a lesser included offense of rape. Similarly, in People v. May, 91 Ill.2d 251, 437 N.E.2d 633 (1982), the Illinois Supreme Court affirmed the defendant's rape conviction and held that he had not been entitled to a jury instruction on battery by bodily harm as a lesser included offense because the two offenses did not have an inherent relationship and protected different interests. The Tenth Circuit Court of Appeals, in United States v. Zang, 703 F.2d 1186 (1982), held that regulatory violations were not lesser included offenses of conspiracy, mail or wire fraud or racketeering, since the elements, proof and interests protected differed greatly.

Two recent Washington cases are especially similar to the present case. In both cases the defendants had requested jury instructions regarding possession of stolen property as a lesser included offense of burglary. Although in each case the courts purported not to use the "inherent relationship" test, they effectively applied that test in reaching the conclusion that the two

offenses were not included. In State v. Chelly, 32 Wash. App. 916 651 P.2d 759 (1982), despite the defendant's argument that his possession of the stolen property was the only direct evidence to connect him with the burglary, the Washington Court of Appeals stated that "we do not believe that possession of stolen property is so closely related to burglary as to make it a lesser included offense . . . " Chelly at 762. In State v. Johnson, 100 Wash.2d 607, 674 P.2d 145 (1983), the Washington Supreme Court also declined to apply the "inherent relationship" test in a similar case because:

> [e]ven federal cases have applied the "inherent relationship" test only to lesser offenses which were in fact part of the same act . . . [h]ere, in contrast, the possession of stolen property was an act entirely subsequent to the unlawful entry with intent to commit theft which constituted the burglary. The mere fact that evidence of the former offense was used to circumstantially prove the latter does not make it a lesser included offense.

Johnson at 158. (emphasis added)

Thus, when the Baker standard is viewed in the context of similar standards in other jurisdictions, its true purpose and limits emerge. The original distinction, made in Whitaker, between the "necessarily included" standard and the "evidence based" standard was designed to avoid the unfair result reached under a purely technical analysis - that simply because the lesser offense was not included in every variation of the greater offense, the defendant was never entitled to a jury instruction on the lesser offense. On the other hand, the fact that the defendant has a more lenient standard to meet when requesting a

lesser included offense jury instruction does not mean he should be allowed to abuse that leniency by demanding "that totally unrelated offenses be deemed included simply because some of the evidence necessary to prove one crime was also necessary to prove the other." Baker at 159. Therefore an evidence-based analysis should go further than a superficial comparison of the elements of the statutes describing the allegedly related offenses. Rather, the factors specified in Whitaker and in the cases following it should be considered in addition to the statutory elements in determining whether the offenses are sufficiently related for the lesser to be deemed included in the greater. Thus, the court should consider whether the interests violated by the two offenses are the same, whether in the general nature of the crimes proof of the lesser is necessarily presented as part of the showing of the commission of the greater offense, and whether the two offenses are part of the same act. In addition, the court should be aware of the fact that simply because commission of the lesser offense is circumstantial evidence of the greater offense does not mean that the lesser is included in the greater. An analysis using these factors will produce a sounder and more realistic interpretation of the Baker standard than does the analysis urged by defendant.

In the case at bar, no "inherent relationship" exists between the offenses of burglary and theft. The interest violated by burglary is that of "the security of habitation or occupancy, rather than ownership or property" 3 Wharton's Criminal Law, § 326 (C. Torcia 14th ed. 1980). Conversely, the interest violated by

theft is that of "the right of property or possession" Id. § 354 (Cf. Smith v. United States, 418 F.2d 1120, 1121 (D.C. Cir. 1969), where the United States Court of Appeals for the D. C. Circuit recognized this difference between the two offenses in noting that cumulative sentences were allowed for robbery (an offense closely related to theft) and housebreaking (an offense closely related to burglary). The court described robbery and housebreaking as "crimes of historically different conception, protecting distinctly different societal interests, and affording protection against markedly different dangers.") Furthermore, it is not true that in the general nature of the crimes of burglary and theft, proof of theft is necessarily presented as part of the showing of the commission of burglary. The offense of burglary is committed if the actor enters or remains unlawfully in a building or part of a building with the intent to commit assault or any felony as well as with the intent to commit theft. Accordingly, proof of intent to commit assault rather than theft can be part of the showing of the commission of burglary, State v. Nebeker, Utah, 657 P.2d 1360 (1983), as well as proof of intent to commit a felony such as arson, State v. Smith, Utah, 621 P.2d 697 (1980). Further, intent to commit a theft can be shown without proof of a completed theft State v. Clements, 26 Utah 298, 488 P.2d 1044 (1921). (See generally, Rogerson v. Harris, supra, and State v. Jones, supra.) The two offenses address two entirely separate acts; burglary addresses unlawful entry or remaining and theft addresses the unauthorized control over the property of another. Clearly then, there is no inherent relationship between the offenses of theft

and burglary. Therefore the trial court was correct in denying defendant's requested jury instruction, since granting the request would have condoned exactly the misuse by defendant against which the Whitaker and Baker courts warned.

The State must concede that the "inherent relationship" test for which it argues above is not supported by this court's recent decision in State v. Brown, Utah, 694 P.2d 587 (1984). In Brown, this Court held in a per curiam decision that the trial court should have granted the defendant's request for a jury instruction regarding simple assault as a lesser included offense of aggravated kidnapping. The elements of the offenses that were relevant in light of the evidence were:

Utah Code Ann., § 76-5-102 (1953) as amended. Assault.

> (1) Assault is:
>
> (a) An attempt, with unlawful force or violence, to do bodily injury to another; or
>
> (b) A threat, accompanied by a show of immediate force or violence, to do bodily injury to another.

Utah Code Ann. § 76-5-302 (1953) as amended. Aggravated Kidnapping.

> (1) A person commits aggravated kidnaping [sic] when he intentionally or knowingly by force, threat or deceit, detains or restrains another against his will with intent:
>
> . . . .
>
> (c) To inflict bodily injury on or to terrorize victim or another; . . . .

In its analysis, this Court merely said the first prong of Baker was met because "some" overlap existed in the definitions of the

two offenses "as a comparison of the elements of assault and kidnapping . . . shows" Brown, at 589-90. However, when the "inherent relationship" test is applied, it can be seen that although some superficial statutory overlap does exist, the two offenses of aggravated kidnapping and assault are unrelated. No inherent relationship exists between the offenses of assault and aggravated kidnapping. The interests violated by the two offenses are completely different. The offense of kidnapping violates the victim's interest in freedom of movement, while the offense of assault violates the victim's interest in his physical safety and freedom from bodily harm. The two offenses address different acts. The gravamen of kidnapping is the act of unlawful restraint while the gravamen of assault is the act of threatening or attempting to inflict bodily harm on another. Additionally, in Brown the assault statute overlaps with only the aggravating portion of the aggravating kidnapping statute. Therefore, the Brown holding that assault is included in aggravated kidnapping results in the anomalous situation that a defendant charged with the more serious crime of aggravated kidnapping may be entitled to a lesser included offense instruction regarding assault, while if he had been charged with the less serious offense of simple kidnapping he would not be entitled to the instruction. This result is illogical, but inevitably follows from the interpretation of the Baker standard used in Brown and urged by defendant in the present case. Respondent urges this Court to abandon the sort of analysis used in Brown for this and any future case, and to adopt the more appropriate "inherent relationship" test.

B. DEFENDANT WAS NOT ENTITLED TO A JURY INSTRUCTION REGARDING THEFT AS A LESSER INCLUDED OFFENSE OF BURGLARY BECAUSE A SUFFICIENT QUANTUM OF EVIDENCE DID NOT EXIST TO PROVIDE A RATIONAL BASIS FOR A VERDICT ACQUITTING HIM OF BURGLARY AND CONVICTING HIM OF THEFT.

Even if theft were closely enough related to burglary to be considered a lesser included offense, the trial court would not be obligated to give a lesser included offense instruction unless in the evidence adduced at trial "there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser offense." Utah Code Ann. § 76-1-402(4) (1953) as amended. Defendant claims that there was a rational basis for a verdict acquitting him of burglary and convicting him of theft. Defendant's argument is that unlawful entry into a portion of a building is an element required for conviction of burglary (see jury instruction #19, Appendix) and that there is evidence that his entry was licensed and therefore lawful. Defendant contends that on the basis of this evidence the jury "may have concluded that Mr. Pitts was merely guilty of wandering to the bathroom and stealing checks along the way" (Appellant's brief at 8) and that he was therefore guilty of theft rather than burglary.

In support of his argument, he cites State v. Chestnut, Utah, 621 P.2d 1228, 1232 (1980), in which this Court stated that any evidence "however slight, on any reasonable theory of the case" under which he might have been convicted of theft rather than burglary, is sufficient to warrant the jury instruction on theft. Defendant interprets this statement to mean that if he can

invent any theory of the case that is supported by even the most far-fetched view of the evidence, the trial court has no discretion to deny his requested lesser included offense instruction. This reasoning ignores both the plain language of the statute and the case law, including Baker, interpreting the statute.

The Baker this Court characterized the evidence-based standard as follows: "When the elements of two offenses overlap . . . , if there is a sufficient quantum of evidence to raise a jury question regarding the lesser offense, then the court should instruct the jury regarding the lesser offense." Baker at 159. The second step of the Baker analysis requires the trial court to decide whether a sufficient quantum of evidence has been presented to justify sending the question to the jury. Even Chestnut, which defendant cites for its "any evidence" language, requires the court to determine whether there is any evidence on any reasonable theory of the case - in other words, whether the defendant's theory of the case is reasonable. "It is the prerogative and the responsibility of the trial court to make the preliminary determination as to what offense reasonable minds might find from the evidence." State v. Lopez, Utah, 626 P.2d 483, 486 (1981). In State v. Tucker, Utah, 618 P.2d 46 (1980), this Court discussed § 76-1-402(4) and stated that "[i]n deciding whether or not such a rational basis exists, the trial court must necessarily be accorded a certain amount of discretion." Id. at 50.

That such discretion exists in the trial court is confirmed by the holdings of the cases applying § 76-1-402(4). In

several cases both before and after Baker, this court has affirmed the trial court's finding of a lack of a sufficient quantum of evidence to warrant the requested jury instruction regardless of the fact that some evidence on the defendant's theory of the case was presented. In State v. Tucker, supra, this Court held that the trial court did not abuse its discretion in finding that there was no rational basis in the evidence to support the defendant's requested jury instruction on joy-riding as a lesser included offense of theft of a motor vehicle. The trial court declined to give the instruction even though the defendant testified that he had intended to return the car, but when the police began to pursue him, he panicked and tried to escape. In State v. Lopez, supra, this Court affirmed the appellant's conviction of second degree murder. The trial court had refused to give a jury instruction on the lesser included offense of the variation of manslaughter which proscribes the killing of another under the influence of extreme mental or emotional disturbance for which there was a reasonable explanation. The jury instruction was refused despite the defendant's testimony that the fight in which the victim was killed was a result of an earlier argument between the defendant and the victim. In State v. Clayton, Utah, 658 P.2d 624 (1983), this Court affirmed the defendant's conviction of attempted second degree murder. The defendant had testified that he and the victim had had a fight fifteen minutes before the shooting, and that he shot the victim to protect himself against an anticipated knife attack. He then claimed that this testimony provided evidence that he killed the victim either in the

heat of passion or in the reasonable belief that the circumstances provided a moral or legal justification for his conduct. Nonetheless, the trial court found no rational basis for the jury to find the defendant guilty of manslaughter rather than murder, and refused to give the lesser included offense jury instruction. In State v. Shabata, Utah, 678 P.2d 791 (1984), the trial court refused to give the defendant's requested jury instruction on manslaughter as a lesser included offense of second degree murder because his theory of the case precluded the instruction. This Court affirmed the conviction and said in dicta that the evidence that the defendant had had an affair with the victim's wife would not have been sufficient to warrant giving the instruction. In each of the foregoing cases, there was some evidence to support the defendant's claim of entitlement to a lesser included offense jury instruction. Nevertheless, in each case the trial court determined in its discretion that there was no rational basis in the evidence to warrant the requested instruction, and in each case this Court affirmed.

Thus the trial court has discretion to decide whether the evidence supporting the defendant's theory of the case meets the second prong of the Baker test; i.e., constitutes a sufficient quantum of evidence to provide a rational basis for a verdict acquitting the defendant of the greater and convicting him of the lesser offense. It therefore follows that a trial court ruling on a lesser included offense instruction should be reversed only for an abuse of that discretion. In the case at bar there was no such abuse of discretion. The evidence to which defendant points to

support his contention that his entry into the back room of the Handy Pantry was licensed does not constitute the required rational basis to acquit him of burglary and convict him of theft. It is true that the Handy Pantry was open to the public at the time of the burglary and that the door to the back room was open. However, it is undisputed that the back room was <u>in fact</u> not open to the public. Furthermore, defendant and all other patrons of the store were on notice of this fact. One of the reasons that the trial court is accorded discretion in this determination is that it requires an evaluation of the evidence. The trial judge, who is present during the testimony and the presentation of the physical evidence, is therefore more qualified than an appellate court to perform this function. In the instant case Judge Banks was able to view the evidence of the photographs of the door leading to the back room and the signs posted on that door. In denying defendant's motion to dismiss, Judge Banks said

> Well, it is obvious from the photographs and the testimony that this was not a portion of the building open to the public in spite of the sign itself, and I don't have any trouble reading that sign walking straight back from even this photograph . . . It is obvious that that is not a portion of the building open to the public. Your shelves and so forth on the outside and the appearance as you enter the door itself shows an office space there. It is a retail store. Your motion is denied.

(T. 119). Morever, although it is true that the store's only bathroom was located in the back room, there was no evidence that defendant was even aware of that fact.

Most important, in all of the cases in which this Court has held that the evidence adduced at trial warranted the giving

of a lesser included offense jury instruction, the holding has explicitly rested at least in part on the fact that the defendant's testimony provided some of the evidence supporting his theory of the case. See, e.g., State v. Hyams, 64 Utah 285, 23 P. 349 (1924) (in view of the defendant's testimony which was in irreconcilable conflict with that of the prosecuting witness, the jury should have been instructed on assault as a lesser included offense of assault with intent to commit rape); State v. Gillian, 23 Utah 2d 372, 463 P.2d 811 (1970) (the defendant's testimony that she was in such a state of emotional upset that she fired shots into a room to scare her boyfriend was evidence that would allow the jury to find her guilty of manslaughter as a lesser included offense of first degree murder); State v. Close, 28 Utah 2d 144, 499 P.2d 287 (1972) (the defendant's testimony that he and the victim were never by themselves, corroborated by the victim's sister, was evidence providing a basis which would justify a verdict of guilty of simply assault as a lesser included offense of indecent assault); State v. Chestnut, supra (the defendant's testimony that he had tried to awaken the motorcycle's owner to ask permission to ride it and that he had intended to return the motorcycle was part of the evidence placing his intent to deprive the owner of the motorcyle in doubt, warranting a jury instruction on joyriding as a lesser included offense of theft of a motor vehicle); State v. Elliott, Utah, 641 P.2d 122 (1982) (the evidence adduced at trial, particularly the defendants' testimony, in which they admitted commission of assault but denied commission of sodomy or intent to commit sodomy, established a

rational basis for a verdict acquitting them of aggravated sexual assault and convicting them of the lesser included offenses of assault or aggravated assault); State v. Oldroyd, Utah, 685 P.2d 551 (1984) (given the defendant's testimony that the gun was unloaded and that he did not point the gun at the police officers, his intent to threaten the officers was clearly in dispute and a jury could rationally acquit him of aggravated assault and convict him of threatening with a dangerous weapon); and State v. Brown, supra, (the defendant's testimony that the victim started the fight and injured him and that his only response was to bite her, although not particularly credible, was evidence that would permit the jury to acquit him of aggravated kidnapping and convict him of assault.[1])

In the present case, defendant not only did not testify, but did not even present any evidence to support his theory of the case. His bald assertions on appeal that the signs prohibiting entry into the back room were not noticeable and that

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[1] The Brown holding is confusing, however, because it seems to rely on a different standard for the second prong of the Baker test than that used in any other cases. As shown previously, all other lesser included offense cases, including a case decided after Brown, State v. Smith, No. 18839, slip op. (Utah May 10, 1985), require either "a sufficient quantum of evidence to provide a rational basis to acquit of the greater and convict of the lesser" (emphasis added) or "any evidence or any reasonable theory of the case." (emphasis added). In Brown, however, this Court states the standard thus: "the judge's sole function is to determine whether there is any evidence that, if believed by the jury, would permit the jury to acquit the defendant of the greater offense and convict defendant of the lesser." Brown at 590. Respondent submits that the Brown standard is inconsistent with the statute, § 76-1-402(4) (see Brown dissent), and urges this Court to affirm the "rational basis" standard as the correct one.

therefore he was licensed to enter are completely unsupported by any evidence, as is shown by Judge Banks' observation at trial, quoted supra. As the Arizona Supreme Court commented, "a defendant is entitled to instructions on the lesser offenses if a reasonable interpretation of the evidence indicates that he could be guilty of those offenses . . . [however] . . . [t]he law does not require instructions on all offenses theoretically included in every criminal information based on the possibility that the jury might simply disbelieve the State's evidence." State v. Wilson, 113 Ariz. 363, 367, 555 P.2d 321, 325 (1976). Since there was no evidence providing a rational basis to both acquit defendant of burglary and convict him of theft, the trial court did not abuse its discretion in denying defendant's request for a jury instruction on theft as a lesser included offense of burglary. Therefore, the defendant's conviction should be affirmed.

POINT II

THE TRIAL COURT WAS CORRECT IN DENYING DEFENDANT'S MOTION TO DISMISS BECAUSE THE STATE PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH A PRIMA FACIE CASE OF BURGLARY.

At trial, after the State rested its case, defendant moved to dismiss the charge, claiming that the State failed to present sufficient evidence to support a prima facie case of burglary (T. 116). The trial court denied the motion (T. 119), and on appeal defendant claims that this denial constituted reversible error. Defendant argues that the State failed to present sufficient evidence of two elements of burglary; the act of unlawful entry, and the intent to commit a theft at the time of entry. There was more than sufficient evidence to establish both of the above elements of burglary.

A. THE STATE PRESENTED SUFFICIENT EVIDENCE TO ESTABISH THE ELEMENT OF UNLAWFUL ENTRY.

Defendant first argues that the State failed to prove that he even entered the back room, because no witnesses were produced who saw him either present in the back room, or enter or exit the back room. While no direct evidence was presented, there was sufficient circumstantial evidence of defendant's entry into the back room to warrant denying his motion to dismiss and submitting the case to the jury. Lorna Strasberg, a Handy Pantry employee, said she had placed the stolen envelope on a desk in the back room on the morning of the burglary (T. 10). Two other Handy Pantry employees, Valerie Swaner and Creed Anderson, saw defendant in the store on the day of the burglary (T. 36, 45). Ordena Longton said she and defendant were at the store on the day of the burglary, and that when defendant came out of the store he had the stolen envelope in his possession (T. 52, 55). Under Utah law, since defendant was in possession of the stolen property and did not offer a satisfactory explanation of this possession, the jury was allowed to infer that he committed the burglary (see jury instruction #18, Appendix). The circumstantial evidence, coupled with the inference legally allowed from the evidence, was sufficient to warrant submission to the jury of the issue of defendant's entry into the back room.

Defendant next argues that the State failed to present evidence that if he did enter the back room, his entry was unlawful. It is not clear whether defendant is claiming that his entry was authorized because the back room was actually open to

the public, or because he did not receive notice that the back room was closed to the public. In either case, defendant's contention is unsupported by the evidence.

It is true that as a matter of law entry into areas open to the public cannot be unlawful. However, several courts have held that within a retail store open to the public, separately secured portions of the store can be considered off limits to the public so that entry into those areas is unauthorized. In Leppek v. State, 636 P.2d 1117 (Wyo. 1981), the defendant was convicted of burglary when he entered a basement storeroom in a drugstore. The defendant argued on appeal that it was legally impossible to commit burglary of a store that was open to the public. The Wyoming Supreme Court upheld the defendant's conviction, finding that the basement storeroom was not open to the public since "[t]here was no purpose for the general public to have access to it. The store owner testified that they 'didn't allow people to go down in the basement'." Id.at 1120. In Sims v. State, 613 S.W.2d 820 (Ark. 1981), the defendant was convicted of burglary when he entered the back room of a convenience store. Even though he claimed that he was looking for a restroom, the court upheld his conviction saying that "the back room was not open to the public because the door was closed and marked 'employees only'." Id. at 821.

It is clear from these cases that a separately secured portion of a retail store can be closed to the public and therefore be the object of a burglary. In the present case Preston Tholen, the owner of the Handy Pantry, testified that the

back room is off limits to the public and that no one but employees are allowed to enter it (T. 22, 28). Additionally, the evidence showed a sign posted on the door to the back room that unambiguously gave notice of that fact (T. 27). That this evidence was sufficient to show that the back room was not in fact open to the public is confirmed by Judge Banks' comments in denying defendant's motion to dismiss, quoted supra.

Defendant also seems to argue that even if the back room was closed to the public, he was not given notice of that fact, and therefore his entry was licensed and lawful. In a case similar to the case at bar, Hanson v. State, 52 Wis.2d 396, 190 N.W.2d 129 (1971), in appealing his burglary conviction, the defendant tried to argue that the State had failed to prove that he knew that his entry was without consent. The Wisconsin Supreme Court upheld his conviction and said:

> [Defendant] would have the state assume the burden of showing [his] state of mind. In the circumstances of this case, it is apparent that the burden was not upon the state to show that the defendant did not know that his entry was without consent . . . In this case there was no consent in fact. The defendant's state of mind is irrelevant because he makes no assertion that he assumed he had consent. . . . Unless the defendant makes some attempt to explain away the evidence that there was no consent in fact, the state has no obligation to assert or prove the subjective state of the defendant's mind. The evidence makes it clear, and the trial judge so held, that the defendant knew that no consent had been granted, and under the facts of this case, no additional proof was required.

Hanson at 132-33. Although Hanson involved interpretation of a statute defining consent, the same reasoning applies in the case at bar.

In the instant case, defendant argues for the first time on appeal that because the store's bathroom was located in the back room his entry into the back room might have been to find a bathroom and that therefore the State should have been required to prove that he received notice that his entry was not licensed. However, he made no attempt at trial to explain away the evidence that there was no consent in fact or to assert that he believed that his entry was licensed. Therefore, the State should not be required to show the subjective state of defendant's mind.

Moreover, the trial judge, who was present during the testimony and presentation of physical evidence, including photographs, was best qualified to decide this issue. Judge Banks' comments, quoted supra, indicate that the evidence adduced at trial was sufficient to submit to the jury the issue of whether defendant received notice. The jury instruction on burglary (see jury instruction #19, Appendix) required the jury to find beyond a reasonable doubt that defendant entered the Handy Pantry back room both unlawfully and knowingly, and the jury found defendant guilty. Therefore, the evidence was sufficient to warrant submitting to the jury the issue of defendant's unlawful entry, and the trial judge was correct in denying defendant's motion to dismiss.

B. THE STATE PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH DEFENDANT'S INTENT TO COMMIT THEFT AT THE TIME OF HIS UNLAWFUL ENTRY.

Defendant argues that the State failed to present prima facie evidence that when he unlawfully entered the back room, he did so with the intent to commit a theft or other felony. In

State v. Brooks, Utah, 631 P.2d 878, 881 (1981), this Court stated "[s]ince the intent to commit a theft is a state of mind, which is rarely susceptible of direct proof, it can be inferred from conduct and attendant circumstances in the light of human behavior and experience." Defendant claims that no such evidence of conduct or circumstances was presented to support the inference that he entered the back room with the requisite intent. It is true that he was not caught in the back room and that no one saw him enter or leave the back room. However, Ordena Longton testified that immediately after leaving the Handy Pantry defendant was in possession of the checks stolen from the back room (T. 55). Furthermore, Merna Norwick and Sharon Spencer testified that he was in possession of the stolen checks later that night (T. 73, 75-76, 81, 83), and the arresting police officers found some of the stolen items in the car he was driving the following morning (T. 93). In Brooks, this Court stated that in cases where there is an actual stealing the intent to steal at the time of the unlawful entry is "apparent." Brooks at 881. Numerous other courts have gone further and held that the trial court was warranted in inferring guilt from the fact that goods stolen from the burgled building were found in possession of the defendant (see, e.g., State v. Carver, 94 Id. 677, 496 P.2d 676 (1972); State v. Talley, 112 Ariz. 268, 540 P.2d 1249 (1975)). In People v. Renteria, 162 Ca.2d 590, 328 P.2d 266 (1958), a California District Court of Appeals held that an inference that the defendant had the requisite intent to steal when he entered the burgled residence was appropriate when he was found in

possession of items stolen from the residence and, when questioned about the ownership of the items he gave false, evasive, and inconsistent answers. In the instant case, not only was defendant found in possession of the stolen checks, but when the arresting officers questioned him about them, he denied any knowledge of them (T. 110). In view of the testimony of the previously mentioned witnesses, this answer was clearly false and evasive.

Additional evidence was adduced at trial that would support the inference that defendant had the intent to commit theft when he entered the back room. Although the bank statement was in plain view on top of a desk, the blank checks were hidden in a box under the desk, and would require a search to be found (T. 24, 31). Furthermore, defendant told Ordena Longton that he knew someone who could "use" the checks (T. 55-56), and Ms. Longton testified that defendant knew someone who could forge the checks for a great deal of money (T. 103). This evidence, together with the evidence that defendant was in possession of the stolen checks and lied about his possession, is sufficient to establish the element of defendant's intent to commit a theft at the time of his unlawful entry into the back room. Therefore, the trial court was correct in denying defendant's motion to dismiss for failure of the State to present a prima facie case.

CONCLUSION

Based on the foregoing arguments, the judgment of the court below should be affirmed.

DATED this 10th day of June, 1985.

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Attorney General

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CERTIFICATE OF MAILING

I hereby certify that I mailed four true and exact copies of the foregoing Brief, postage prepaid, to Nancy Bergeson, Salt Lake Legal Defender Association, 333 South Second East, Salt Lake City, Utah 84111, this 10th day of June, 1985.

Earl F. Dorius

APPENDIX

INSTRUCTION NO. 18

Utah Law provides that:

> "Possession of property recently stolen when no satisfactory explanation of such possession is made, shall be prima facie evidence that the person in possession stole the property."

Thus if you find from the evidence and beyond a reasonable doubt, that the defendant was in possession of stolen property, that such possession was not too remote in point of time from the theft, and the defendant made no satisfactory explanation of such possession, then you may infer from those facts that the defendant committed the theft.

You may use the same inference, if you find it justified by the evidence, to connect the possessor of recently stolen property with the offense of burglary.

INSTRUCTION NO. 19

Before you convict the defendant, LAWRENCE PITTS, of the crime of Burglary, a Third Degree Felony, you must find from the evidence, beyond a reasonable doubt, all of the following elements of that offense:

1. That on or about the 4th day of August, 1984, in Salt Lake County, Utah, the defendant, LAWRENCE PITTS, entered or remained in the building of Handy Pantry;

2. That he did so unlawfully;

3. That he did so intentionally or knowingly;

4. That he did so with the intent to commit a theft.

If you are satisfied beyond a reasonable doubt that the State has proved each and every one of the above-mentioned elements, it is your duty to convict the Defendant. On the other hand, if the evidence has failed to so establish one or more of said elements, then you should find the Defendant not guilty.

Before you may convict the defendant of the offense of Theft, a lesser included offense of Burglary, the State must prove each and every one of the following elements to your satisfaction and beyond a reasonable doubt:

1. That on or about August 4, 1984, defendant exercised unauthorized control over the property of Handy Pantry.

2. With the intent to deprive Handy Pantry of the property.

3. That all acts occurred in Salt Lake County, State of Utah.

If the State has proven each and every one of the foregoing elements to your satisfaction and beyond a reasonable doubt, then it is your duty to convict defendant of the offense of Theft, a lesser and included offense of Burglary in the Information.

Dennis
Lyle.